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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER

v.

NEW JERSEY WOOD FINISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 19, 1964, inviting the Solicitor General to express the views of the United States (R. 93–94).

JURISDICTION

The opinion of the court of appeals (R. 69–92) is reported at 332 F. 2d 346. The opinion of the district court (R. 58–67) is reported at 216 F. Supp. 507.

OPINIONS BELOW

The judgment of the court of appeals (R. 92) was entered on May 20, 1964. The petition for certiorari was filed on July 17, 1964, and granted on Octo-

ber 19, 1964 (R. 93; 379 U.S. 877). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pendency of a Federal Trade Commission proceeding under the antitrust laws tolls the statute of limitations applicable to a private action based upon the same matter.

2. If the answer to the first question is "yes," a further question presented is whether respondent's treble-damage claims under the Sherman Act were "based in whole or in part on any matter complained of" in the prior Commission proceeding under the Clayton Act, so that the statute of limitations was tolled in this case.

STATUTE INVOLVED

The relevant statutory provisions are Section 4B and 5 of the Clayton Act. Sectioon 4B, 69 State. 283, 15 U.S.C. 15b provides, in relevant part, as follows:

> Any action to enforce any cause of action under sections 4 or 4A of this title shall be forever barred unless commenced within four years after the cause of action accrued. * * *

Section 5 of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 16 in its present form (and as amended in 1955 to take account of the enactment of Section 4B) reads as follows:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws

shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 5, as originally enacted (38 Stat. 731) and until 1955, read as follows:

That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws

to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken: * * *

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

STATEMENT

1. THE FACTS

On June 24, 1960, the Federal Trade Commission issued a complaint against petitioner charging a violation of Section 7 of the Clayton Act (R. 15a–25a). The complaint alleged the following facts:

Petitioner, a world-wide business enterprise, manufactured a number of varied products, including certain electrical insulation products. Between 1952 and 1956 it acquired fourteen companies, eight of which were in the electrical insulation field. Among the eight firms acquired were leading manufacturers of electrical insulation products and also two of the three largest distributors of such products (R. 17a–21a).

One of the two distributors was Insulation and Wires, Inc. ("IWI"), which petitioner acquired in August 1956 (R. 20a). By virtue of these acquisitions, petitioner became the largest distributor of electrical insulation products and also the largest manufacturer and seller of such products to original equipment manufacturers and to distributors (R. 22a–24a).

These acquisitions were alleged to have resulted in "the actual or potential lessening of competition and a tendency to create a monopoly" in the sale and distribution of electrical insulation products, because, *inter alia*, "[m]anufacturers of electrical insulation products have been foreclosed from a substantial share of the markets for said products" (R. 25a).

The Commission proceeding was terminated by a consent order dated August 24, 1961 (R. 47a) which, among other things, ordered divestiture of IWI (R. 44a–45a).

On November 20, 1961, respondent filed in the district court a complaint under the antitrust laws naming as defendants both petitioner and Essex Wire Corp., the company which had owned IWI prior to its acquisition by petitioner (5a–9a, 48a–55a).[1] The complaint sought treble damages and other relief. The complaint alleged that respondent was a manufacturer of electrical insulation products and had relied primarily on IWI, prior to petitioner's acquisition thereof, for the distribution throughout the

[1] The complaint was amended pursuant to order of the district court (R. 56a–57a). The changes made by the amendment are apparently not material to the issues here involved (See Pet. 6) and appropriate record references will therefore be made to the amended complaint (R. 48a–55a).

United States of respondent's products; that petitioner had entered into a combination and conspiracy to restrain, and had attempted to monopolize, trade in the manuufacture, sale and distribution of electrical insulation products; that one of the objects of the conspiracy was the elimination and suppression of competition in the distribution of such products; that the acquisition of IWI, the third largest distributor in the country, was one of the acts in furtherance of this conspiracy and attempt to monopolize; and that the result, among others, was to foreclose to respondent a substantial portion of the national market for electrical insulation products, in violation of Sections 1 and 2 of the Sherman Act. The complaint also alleged that petitioner's acquisition of IWI violated Section 7 of the Clayton Act and that respondent was damaged thereby.

2. THE DECISION OF THE DISTRICT COURT

Petitioner moved to dismiss the complaint or, alternatively, for summary judgment (R. 11a–13a), on the ground that respondent's action was barred by Section 4B of the Clayton Act, 15 U.S.C. 15b, because it had not been commenced within four years after the cause of action accrued. The district court denied the motion, holding that under Section 5(b), 15 U.S.C. 16(b), the limitations period had been tolled by the pendency of the Federal Trade Commission proceeding against petitioner (R. 66a–67a).

The court further held that the tolling provision of Section 5(b) applies, notwithstanding that the proceeding had terminated in a consent order before the

taking of testimony and that, therefore, under Section 5(a), that order could not have been used by respondent as *prima facie* evidence in the present action.

Finally, the court rejected petitioner's contention that the statute of limitations is not tolled as to respondent's claims based on the Sherman Act. It ruled that those claims are "based in whole or in part on any matter complained of in [the government] proceeding," as required by Section 5(b), since "[t]he factual issues, centering around [petitioner's] acquisition of IWI in August 1956 and the consequent effects of such acquisition on competition in the electrical insulation field, appear to be substantially identical in the proceedings" (R. 65a).

3. THE DECISION OF THE COURT OF APPEALS

On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals upheld the denial of petitioner's motion (R. 92–93). Although its reasoning was similar to that of the district court, it went further in one respect. Petitioner argued below that the sole purpose of Section 5(b) was to afford the private suitor an opportunity to introduce as prima facie evidence (under Section 5(a)) the judgment or decree rendered in the prior government suit, and hence that a proceeding which cannot yield such a judgment or decree does not toll the statute of limitations under Section 5(b).[2] The district court had

[2] Petitioner appears to have receded from the position urged below (R. 61a–62a, 86–87), and also suggested in the petition for certiorari (Pet. 8–9), that a proceeding which *does not* (as distinguished from one which *cannot*) yield prima facie evi-

ruled that Section 5(b) had a broader purpose, *i.e.*, to enable the private suitor to gain the benefit of all information uncovered in the government proceeding. Accordingly it did not reach the question whether a Trade Commission cease-and-desist order would be admissible as prima facie evidence under Section 5(a). The court of appeals noted that the district court's position had substantial support (R. 89–90). It held, however, that a final cease-and-desist order in a Commission proceeding *is* admissible as prima facie evidence under Section 5(a) (R. 89),[3] and that such a proceeding plainly tolls the limitations period under Section 5(b).

SUMMARY OF ARGUMENT

I

While the words of Section 5(b) do not readily encompass the present case, the basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The purpose was to facilitate private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to wait and take advantage of the evidence produced by the government pro-

dence would not toll limitations and that therefore a government proceeding terminated by consent, as was the instant one, would not toll limitations.

[3] The court of appeals reached this question although the proceeding had terminated in a consent order and the order was therefore inadmissible as prima facie evidence in respondent's private action. It did so because it noted there was some evidence in the legislative history that the two subsections should be construed together and lower courts had so held (R. 89).

ceeding. While one of the advantages of waiting—the availability of the "judgment or decree" as *prima facie* evidence—may be confined to the adjudications of a court, other major advantages result from the evidence and leads to evidence developed by the government through expensive processes of discovery and investigation that a private suitor usually cannot afford. The latter advantages flow equally from court actions and Federal Trade Commission proceedings. In both cases the effect upon the defendant is the same; the delay cannot lull him into false security for he is timely charged with antitrust violations and actively engaged throughout the whole proceeding in preparing and presenting his defense. In both cases there would be duplication and waste motion in forcing private plaintiffs to go forward while the major proceeding brought by the government to determine whether there has been an antitrust violation is incomplete. It seems fair to say, therefore, that the basic purpose of tolling the statute of limitations in the case of judicial proceedings is equally applicable to proceedings before the Federal Trade Commission.

If Congress had plainly indicated a desire to distinguish between the two, its enactment would be conclusive no matter how irrational the differentation might seem. But the words are not that clear, especially when read in the light of the evolution of the Clayton Act. The provision from which Section 5(b) was derived provided for suspension in the case of any of the public enforcement proceedings authorized

by the original bill; for all were judicial. When criminal penalties were dropped and FTC proceedings authorized, no corresponding change was made in Section 5(b). Again, if a plausible reason rooted in policy could be suggested for the failure to add words more descriptive of Federal Trade Commission proceedings, we would acknowledge that a narrow, verbal interpretation might be required. None has been suggested. The fact appears to be that attention was focussed upon the very different problems of Section 5(a) and no one either noted or denied that the reason of Section 5(b) was equally applicable to the proposed new method of enforcement by the Federal Trade Commission.

Under these circumstances, we submit, the Court should apply Sections 4B and 5(b) in a way that gives effect to the basic legislative policy. Even in the absence of statutory guidance a period of limitations is not totally inflexible. Courts have traditionally looked to other settled policies to determine whether the statute should be tolled. *E.g. Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231. When statutory evidence of a basic policy arguably saving the plaintiff's rights is available, the authorities "indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (*Burnett* v. *New York Central R. Co.,* No. 437, this Term, decided April 5, 1965, slip opinion, p. 4).

In such a context, Section 5(b) should not be given a niggardly effect limited by verbal exegesis. "A statute may indicate or require as its justification a

change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. * * * The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before" (Mr. Justice Holmes on circuit in *Johnson* v. *United States,* 163 Fed. 30, 32, quoted with approval in *United States* v. *Hutcheson,* 312 U.S. 219, 235). So here, the major premise adopted by the Congress in enacting Section 5(b)—that plaintiffs in treble-damage actions should be free to await the benefit of timely government enforcement proceedings—is plainly indicated, and the courts should give effect to that policy of Congress, however inartistically it may seem in retrospect to have been expressed.

Under this analysis, problems concerning the interpretation of Section 5(a) become irrelevant. We may concede *arguendo* that the court below erred in concluding that a Federal Trade Commission order is a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States." Not only are the critical words "judgment or decree" absent from Section 5(b), but the considerations bearing upon whether an administrative order should be given the same effect as a court adjudication in subsequent litigation are altogether different from those determining whether the running of the statute of limitations should be tolled. Moreover, since the focal issue is the effect to be

given the policy of Section 5(b) in applying Section 4B, the result should be the same, however the words in "any civil or criminal proceeding * * * brought by or on behalf of the United States" are construed.

II

The second issue in the case is whether respondent's cause of action arising under the Sherman Act was "based in whole or in part on any matter complained of" in the prior Clayton Act proceeding before the Commission. If not, then the statute of limitations was not tolled by this particular Commission proceeding even if, as we have argued, such proceedings stand on the same footing as judicial suits. We agree, however, with the court below that since the Sherman Act and Clayton Act claims were founded upon substantially the same underlying conduct, the "matter complained of" was the same for purposes of tolling the statute of limitations.

ARGUMENT

I

THE PENDENCY OF A FEDERAL TRADE COMMISSION PROCEEDING UNDER THE ANTITRUST LAWS TOLLS THE STATUTE OF LIMITATIONS APPLICABLE TO A PRIVATE ACTION BASED UPON THE SAME MATTER

Most of the argument in the present case, like the opinions below, is directed to the question whether the proceeding before the Federal Trade Commission is "any civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5 of the Clayton Act. In our view, this form of analysis puts the emphasis upon the wrong question. The ulti-

mate and only decisive issue here is whether the respondent's action is barred by the running of the four-year period of limitations set out in Section 4B of the Clayton Act. Since four years had elapsed after the cause of action arose, that question turns upon whether the running of the statute was tolled by the proceeding before the Federal Trade Commission. No citations are required to show that tolling may occur in the absence of an express and specific statutory exception. In this case the primary relevant evidence of congressional intent is to be found, of course, in Section 5(b), but under the authorities the critical inquiry is not limited by the literal reading of the words: it is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (*Burnett* v. *New York Central R. Co., supra,* decided April 5, 1965, slip opinion, p. 4).

The public interest, especially the interest in preserving a competitive economy with which the Department of Justice and Federal Trade Commission are charged, would be best served by holding that the running of the statute of limitations on private actions is suspended during the pendency of a Federal Trade Commission proceeding alleging violation of the antitrust laws and for one year thereafter, as both courts below held (R. 64a, 81). Private treble damage suits play an important role in antitrust enforcement, yet their effectiveness often depends upon evidence or leads to evidence developed by the superior resources of the government in judicial and administrative proceedings. From this standpoint there is scant difference between actions brought in court by the

Department of Justice and proceedings instituted before the Federal Trade Commission. Nor is it desirable to have the rights of potential private litigants turn on whether the Department of Justice or Federal Trade Commission takes the responsibility for attacking a particular violation of Section 7.

We recognize that there are serious obstacles to reaching the conclusion of the courts below, even though we are convinced that it best comports with the public interest. In our view, however, their answer carries out the policy of Sections 4B and 5(b) and can fairly be derived from the following elements.

A. THE BASIC POLICY OF SECTION 5(b) IS APPLICABLE TO FEDERAL TRADE COMMISSION PROCEEDINGS

Section 5(b) of the Clayton Act provides—

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; * * *.

It must be conceded, we think, that the words of Section 5(b) do not readily encompass the present case. No one would spontaneously describe an administrative proceeding upon a complaint issued by the Federal Trade Commission as a "civil or criminal proceeding * * * instituted by the United States" or—to use the original words of Section 5(b)—as a "suit or

proceeding in equity or criminal prosecution." The Department of Justice brings the suits and criminal prosecutions in the name of the United States, while the independent regulatory agencies sue and are sued in their own name. And the United States does not initiate the proceedings before an administrative agency. Nevertheless, even on a verbal level, there is room for debate. The practices just mentioned were unfamiliar in 1914 when Section 5(b) became law. The Federal Trade Commission is an agency of the United States. An administrative proceeding is a "civil proceeding" in the broad sense of the words, and it results in an order not significantly different from the injuction issued by the courts.

The basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The broad object of authorizing private suits for treble-damages in the original Sherman Act was "to use private self-interest as a means of enforcement" of the antitrust laws. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751–752. In giving "to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee," Congress provided in the original Sherman Act "a strong and reliable motive for enforcement" (*ibid.*). By this means, Congress sought at the very outset to enlist the business community as "allies of the Government in enforcing the antitrust laws * * *" (51 Cong. Rec. 16319).

It soon became apparent, however, that preparing an antitrust case against a major corporate offender was a larger task than most injured persons could afford. Thus, in a message delivered to Congress on January 20, 1914 (51 Cong. Rec. 1964), President Wilson urged

> * * * giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.

It was in response to that recommendation that Section 5 was enacted. "Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568). In the words of the committee reports, the "entire provision is in-

tended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H.R. No. 627, 63d Cong., 2d Sess. 14; S. Rep. No. 698, 63d Cong., 2d Sess. 45.

At the time of its enactment, the tolling provision was no doubt looked upon primarily as a handmaiden to the prima facie evidence clause, *i.e.*, as a means of assuring the private litigant an opportunity to reap the benefit of the decree rendered in the government suit. If that were its sole function, one might well question whether the tolling provision should be applicable to Commission proceedings. For, it seems unlikely that administrative cease-and-desist orders should qualify as prima facie evidence of treble-damage liability in a later court suit (see *infra*, pp. 34–35).

But implementation of the prima facie evidence provision is not the only means by which the tolling paragraph may ease the burdens of treble-damage litigation and thereby strengthen the role of the private suitor in the antitrust enforcement scheme. Tolling also enables the litigant "of small means" to use the prior government suit in other ways equally germane to the basic purpose of Section 5. In particular, suspension of the statute of limitations makes available to the treble-damage claimant the underlying facts and evidence brought to light by the government through its greater investigative resources and disclosed by the record of the prior suit. In this way, the private suitor is guided to the witnesses,

documents, and other evidence essential to his case. "[E]ven where prior government judgments are for no purposes admissible, former enforcement proceedings may lighten private plaintiffs' burden by settling difficult questions of law, spotlighting violations as well as valuable sources of information, and schooling subsequent litigants in tested pleading and trial techniques." Bicks, *The Department of Justice and Private Treble Damage Actions,* 4 Antitrust Bull. 5, 7 (1959). Another commentator, after noting that "[p]robably the most important single function of the plaintiff's lawyer in a private antitrust case is that of securing the evidence * * *," pointed to government cases as a source of evidence and declared that "even though orders of the F.T.C. and particular evidence or testimony in government cases may not be admissible as primary evidence in proof of plaintiff's case, all of such material is useful as furnishing both background data and leads to plaintiff's counsel and also as potentially impeaching material." Loevinger, *Handling a Plaintiff's Antitrust Damage Suit,* 4 Antitrust Bull. 29, 43, 44 (1959).

Nor are such advantages confined to situations in which the prior enforcement suit has failed to produce an admissible decree. Even where such a decree is available, command of the underlying evidence may enable the claimant to make a more persuasive showing than he could by resting on the prior judgment alone. It may also aid him in the difficult task of estimating and proving his damages. Although these effects were not in the forefront of Congressional attention in 1914, they are plainly encompassed by

the basic purpose of the tolling provision—*i.e.*, to give the private suitor the benefit of the government's fact-finding resources and thus strengthen his role in the enforcement scheme.

In short, in terms of the basic statutory objective of facilitating private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to wait and take advantage of the evidence the government's proceeding may produce, it makes no difference whether the prior government proceeding is brought by the Justice Department or the Federal Trade Commission.

From the standpoint of fairness to a defendant charged with antitrust violations the effect is also the same. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them" (*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–349). In Section 5(b), however, Congress expressed the clear judgment that the policy of repose was out-weighed by the policy of promoting compliance with the antitrust laws by facilitating private actions based upon developments in a prior government enforcement proceeding to prevent and remedy violations. There is scant danger of unfairness when the government's action is instituted

within the statutory period for bringing private actions, for in such a case the defendant is given timely notice that it is charged with antitrust violations, and it will be actively engaged throughout the whole proceeding in preparing and presenting its defense. It cannot make the slightest difference whether the government's proceeding is a civil or a criminal action in the courts or an administrative hearing before the Federal Trade Commission. The issues will be the same; the relevant facts and legal questions will usually be identical; and the likelihood of subsequent private actions is as great in one case as the other.

From the standpoint of the courts, the reasons that justify tolling the statute in the case of judicial proceedings are equally applicable when the government seeks an administrative remedy. The private claims will be neither more stale nor less. The evidence will be as available in one case as in the other. Indeed, there are obvious gains to judicial administration in permitting private plaintiffs to postpone their actions until the central question whether the defendants have violated the antitrust laws has been determined in a single, major proceeding prosecuted by the government.

Finally, to differentiate between the rights of plaintiffs when the Department of Justice institutes judicial proceedings and their rights when the Federal Trade Commission institutes administrative action would introduce troublesome and capricious distinction into the law. Both the Department of Justice and Federal Trade Commission have authority to institute proceedings for violations of the antitrust laws, the

one in court and the other by administrative proceedings. The Section 7 case against petitioner might equally well have been brought by the Department. The two agencies cooperate in allocating responsibility for particular violations to one or the other, so that defendants will not be put to the expense and risks of two proceedings. From the government's standpoint a rule that injured parties may delay bringing their actions when the government proceeds in court but not when it proceeds administratively would inject what ought to be an irrelevant element into the selection of the prosecuting agency. From the standpoint of the person injured it is capricious, if not unfair, to lose rights when the government chooses to proceed against the defendant through one agency which he would not have lost if it chose to proceed through the other.

In sum, we submit that the basic policy of tolling the statute of limitations in the case of judicial proceedings is equally applicable to proceedings before the Federal Trade Commission. There is no rational basis for different treatment of the two.

We recognize, of course, that if Congress had plainly indicated a desire to distinguish between the judicial and administrative proceedings with respect to the tolling of the statute of limitations, its enactment would be conclusive no matter how inadequate the basis for the differentiation might seem. But the words of Section 5(b) are not that clear, especially when read in the light of the evolution of the Clayton Act. Even if "civil or criminal proceeding * * * instituted by the United States" were thought not to

include a Federal Trade Commission proceeding as a matter of textual construction, the broadest conclusion which could fairly be drawn is that Congress mentioned the obvious and familiar instances but failed to advert to the novel administrative analogue.

The legislative history makes this clear. As originally passed by the House, the bill which became the Clayton Act (H.R. No. 15657, 63d Cong., 2d Sess.) did not provide for concurrent enforcement by the Federal Trade Commission. The substantive prohibitions of the bill[4] were to be enforced exclusively by judicial proceedings, *i.e.*, criminal prosecutions, civil injunction suits brought by United States Attorneys (Section 15, then numbered Section 13), and treble-damage suits by private litigants (Section 4, then numbered Section 5). Section 5 (then numbered Section 6) was part and parcel of that exclusively judicial enforcement scheme, providing—

> That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has monopolized, or attempted to monopolize or combined with any person or persons to monopolize, any

[4] The bill contained four substantive antitrust provisions designed to outlaw specified practices: price discrimination (Section 2); exclusive and tying contracts (Section 3, then numbered Section 4); intercorporate stockholding (Section 7, then numbered Section 8); and interlocking directorates (Section 8, then numbered Section 9).

> part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws.
>
> Whenever any suit or proceeding in equity is hereafter brought by or on behalf of the United States, under any of the antitrust laws, the statute of limitations in respect of each and every private right of action, arising under such antitrust laws, and based, in whole or in part, on any matter complained of in said suit or proceeding in equity, shall be suspended during the pendency of such suit or proceeding in equity. [S. Doc. 584, 63d Cong., 2d Sess., pp. 6–7, comparative print of H.R. 15657]

It is plain, of course, that at that stage the words of Section 5 were framed solely with reference to judicial proceedings and were intended to carry their natural meaning. Another, more important, conclusion is also warranted: the language was not chosen with a view to discriminating between judicial suits brought by the Justice Department and administrative proceedings before the Federal Trade Commission, since the latter had not yet been authorized; the statute of limitations was to be tolled by the only type of civil enforcement proceeding then contemplated.

The Senate Judiciary Committee proposed to eliminate the penal provisions from the House bill and to add a provision (now Section 11, 15 U.S.C. 21) giving the Federal Trade Commission (and, in appropriate cases, the Interstate Commerce Commission and Federal Reserve Board) concurrent enforcement power. After extended debate (51 Cong. Rec. 13848–49, 14088–100, 14200–228, 14250–76, 14312–23, 14460–61, 15818–21, 15827–29, 15854–67, 15934, 15946–57, 14986–87, 15996–16005, 16042, 16057–58, 16116–17, 16142–47, 16152–62, 16273–76, 16280–81, 16317–18),[5] those amendments were adopted.

Significant changes were also made in Section 5,[6] but the changes and virtually all of the legislative discussion were concerned with the first paragraph (now subsection (a)), and particularly with the question whether the judgment or decree rendered in the government's suit should be conclusive evidence

[5] Proponents of the change expressed the view that criminal penalties were too harsh (S. Rep. 698, *supra*, 43), that juries were disinclined to convict (14250, 16274), and that experience in attempting to enforce the Sherman Act by criminal process had shown this method to be ineffective (14274, 14312). Those who opposed the change were of the view that the sanctions which the Federal Trade Commission could impose were too mild to be as effective as criminal penalties (see, *e.g.*, 15819–21, 15867, 16280–81).

[6] The following significant changes should be noted: (1) Under the House version, a final judgment or decree was to be *conclusive* evidence in a treble-damage suit; the Senate version accorded such judgments or decrees only *prima facie* effect; (2) the House version would have applied only to a "suit or proceeding in equity"; the Senate version applied to "any criminal prosecution" as well; (3) the Senate added the proviso that "[t]his section shall not apply to consent judgments or decrees entered before any testimony has been taken. * * *"

against the defendant in subsequent private litigation (as the House bill provided) or merely *prima facie* evidence (as the Senate Committee proposed). The participants in the debate repeatedly referred to the first paragraph of Section 5 (now Section 5(a)) as though it applied only to judicial proceedings; it is fair to say that most of the debate was predicated upon that assumption. In contrast, the tolling provision was not a subject of controversy and received only passing reference.[7] There is no evidence that

[7] When the bill left the conference committee and went back to the House, the managers were called on to defend their handiwork against the charge that elimination of the criminal penalties had removed the bill's "teeth." Chairman Webb of the House Judiciary Committee attempted to describe the proposed enforcement procedures in the strongest possible light. After reading Sections 5 and 11 (the provision vesting enforcement responsibility in the Trade Commission), he stated (51 Cong. Rec. 16274):

> Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only suspend the statute of limitations against an individual if a *Government* suit is brought against a trust, but we also require the *Federal Trade Commission* to stop these practices and take those guilty of such practices into court.
>
> But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:
>
> No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.
>
> So you have three or four distinct remedies, all of which may be invoked at the same time. [Emphasis added.]

It would appear, therefore, that Chairman Webb differentiated between suits by the "Government"—the suits to which the

any member of the Congress addressed himself specifically to the question whether the proposed proceedings before the Federal Trade Commission were or were not encompassed by the tolling provision. No one suggested that the language was broad enough to cover them, but, on the other hand, neither did anyone suggest that the previous intent to toll the running of limitations in the case of all civil enforcement proceedings ought not to encompass the Federal Trade Commission. The most that can be said, as we read the history, is that there was a loose tendency to assume that the second paragraph of Section 5 (now Section 5(b)) rode along with the first paragraph, probably because of the mistaken assumption that the chief reason for waiting would be to use the judgment or decree as evidence, and no one noted that the policies underlying the *prima facie* evidence and tolling provisions became quite separable as soon as the provisions for Federal Trade Commission pro-

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tolling provision applied—and proceedings of the Federal Trade Commission. That he equated the former with actions brought under the direction of the Attorney General was confirmed only moments later by the following exchange (51 Cong. Rec. 15276):

> Mr. HARDY. Under the bill does the Government have the authority to bring suit for injunction as well as private parties?
>
> Mr. WEBB. Yes. Section 15 gives the district attorneys under the direction of the Attorney General the right to apply for an injunction.

While these statements, taken together, seem to presuppose that the tolling provision applies only to suits brought by the Attorney General, it is apparent that Chairman Webb's attention was not focused upon the present issue. Under such circumstances his passing words, while his mind was directed to another point, cannot be given controlling weight.

ceedings were introduced. For while a strong argument can be made that an order resulting from what were then conceived to be novel and highly flexible administrative proceedings ought not to be *prima facie* evidence in an action at law, there was, as we have seen, scant basis for differentiating administrative and judicial proceedings with respect to other benefits derived by potential plaintiffs from the tolling provision.

The short of the matter follows:

(1) The basic policy upon which Section 5(b) is predicated is no less applicable to Federal Trade Commission proceedings than to judicial proceedings instituted by the Department of Justice in the name of the United States. The purpose was to facilitate private suits for treble damages as sanctions for enforcing the antitrust laws by enabling the private suitor to reap the advantage of the evidence brought to light by the government suit. While the availability of the "judgment or decree" as *prima facie* evidence may have been conceived to be the principal advantage and to have been confined to judicial determinations, there are in fact other practical benefits flowing equally from court actions and Federal Trade Commission proceedings.

(2) The words "any civil or criminal proceeding * * * instituted by the United States" (Section 5(b)) resulted from the original form of the Clayton bill and their juxtaposition in relation to Section 5(a) rather than from a deliberate decision to toll the statute only in the case of judicial proceedings.

B. THE BASIC POLICY OF SECTION 5(b) SHOULD CONTROL THE APPLICATION OF SECTION 4B

We submit that under the circumstances set forth above, the courts should apply Sections 4B and 5(b) in a way that gives effect to the basic legislative policy. The critical issue is not the textual construction of Section 5(b), but whether respondent's action is barred by the four-year period of limitations provided by Section 4B. The latter's effect cannot be determined merely by reading the words. Even in the absence of statutory guidance courts have traditionally looked to other settled policies to determine whether the running of a statute of limitations should be tolled. Thus, the plaintiff is excused where his delay results from the misconduct of the defendant, *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231; where war deprives him of a tribunal, *Hanger* v. *Abbott,* 6 Wall. 532; and where he brings suit but in the wrong venue, *Burnett* v. *New York Central R. Co.,* No. 437, this Term, decided April 5, 1965. "These authorities indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Ibid.*, slip opinion, p. 4.

In such a context, Section 5(b) should not be given a niggardly effect confined by verbal exegesis. The question is whether congressional purpose is served by tolling the statute of limitations. That purpose must be given judicial effect if it is fairly discernible behind the specific manifestation. The rule applicable to such cases was stated, albeit in a somewhat

different context, by Mr. Justice Holmes sitting on circuit in *Johnson* v. *United States,* 163 Fed. 30, 32 (C.A. 1):

> A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

The principle finds many illustrations. It is familiar law that violation of a criminal or penal statute containing no express reference to civil liability will lay the foundation for liability based upon the mere violation of the statute or a ruling that the violation is negligence *per se. Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33; Harper and James, *The Law of Torts,* § 17.6; Prosser, *Torts* (1964 ed.), 191–93. In such cases, as Professor Prosser points out (p. 193), the courts are shaping the judge-made law "to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind." Similarly, criminal statutes treating intercourse with an adolescent girl as rape have been given the effect of negating the defense of consent in a civil

action for battery because the premise underlying the criminal law—adolescent incapacity to form an intelligent judgment—is equally applicable in the action to impose civil liability. *Gaither* v. *Meacham,* 214 Ala. 343, 108 So. 2d; *Bishop* v. *Liston,* 112 Neb. 559, 199 Northwestern 825; 1 Restatement of Torts § 61; Harper and James, *The Law of Torts* § 3.11. See also the discussions of the underlying principle in Landis, *Statutes and the Sources of Law,* Harvard Legal Essays (1934) 214; Pound, *Common Law and Legislation,* 21 Harv. L. Rev. 383 (1908); Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 13 (1936). See also *Gooch* v. *Oregon Short Line R.R. Co.,* 258 U.S. 22, 24; *Van Beeck* v. *Sabine Towing Co.,* 300 U.S. 342, 351 (Cardozo, J.); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 391.

The principle was applied to interrelated statutes in *United States* v. *Hutcheson,* 312 U.S. 219, where the Court, relying upon the precept quoted above from Mr. Justice Holmes' opinion in *United States* v. *Johnson,* held that the definition of labor dispute in the Norris-La Guardia Act, which by its terms was only a definition for the purpose of restricting the power of the courts to issue injunctions, exemplified a broader, underlying policy immunizing labor unions against liability in a criminal prosecution or action for damages, and the broader policy was therefore read into Section 20 of the Clayton Act.

In the present case, the major premise adopted by Congress in enacting Section 5(b)—that plaintiffs in treble damage actions should be free to await the bene-

fit of timely government enforcement proceedings—is as applicable to administrative proceedings instituted by the Federal Trade Commission as it is to lawsuits initiated by the Attorney General in the name of the United States. Where the basic policy is so plain, it would be a misfortune if a narrow or grudging process of construction were to confine the effect of the statute to the particular cases to which Congress adverted and so to discriminate against injured persons whose equity is indistinguishable. "There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 351. As pointed out above, this Court recently held in *Burnett v. New York Central R. Co., supra,* decided April 5, 1965, that in applying a statute of limitations "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances" and that "[i]n order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." In the present case, such an examination of the "purposes and policies underlying" the tolling provision and the Clayton Act's enforcement scheme yield the conclusion that the tolling provision should apply to Trade Commission proceedings no less than to Justice Department suits.

C. SECTION 5(a) IS IRRELEVANT

For the purposes of the present case we may assume that the court below erred in concluding that a Federal Trade Commission order is a "final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States." The court's construction seems exceedingly difficult as a matter of terminology, for whatever may be the meaning of "any civil or criminal proceeding," both ordinary legal usage and the Clayton Act itself draw a sharp distinction between a "final judgment or decree" rendered by a court and an administrative "order." The legislative history apparently supports the petitioner's interpretation of Section 5(a).[8]

[8] Three items seem particularly significant.

(i) The principal subject of controversy in connection with Section 5 was whether the judgment or decree rendered in the government suit should be *conclusive* evidence against the defendant in subseqent private litigation (as the House bill provided) or merely *prima facie* evidence (as the Senate Committee proposed). Senator Walsh, who led the unsuccessful fight for the House version, defended its constitutionality on the ground that the defendant "has had an opportunity to try out before a court, with all the forms of law, every question involved in the *lawsuit*. * * * Here the party has had its day in *court*. He has tried every issue and it is simply a question, now that he has it tried, whether he may insist upon a *second trial*." (51 Cong. Rec. 13851, 13857, emphasis added.) Even more significant was the fact that opponents of the "conclusive evidence" proposal never challenged the premise, implicit in the remarks of Senator Walsh and others, that only decrees rendered in *judicial* proceedings were contemplated by Section 5. Not once did they suggest that under the House version, administrative findings based upon judicially-incompetent evidence would be conclusive of the defendant's liability in a treble-damage action. A constitutional objection based on that ground

There are grave difficulties (i) with the court's ruling that a Federal Trade Commission order became a final judgment or decree when carried to the court of appeals prior to the enactment of the Finality Act. 73 Stat. 243, but not otherwise—a wholly aritficial result—and (ii) with ascribing to the

would have been more substantial than any of those actually raised and undoubtedly would have been made had any member of Congress believed the argument possible.

(ii) We have already noted the remarks of Chairman Webb in defending the bill, newly emerged from conference, against the charge of "toothlessness" (*supra*, p. 25, fn. 7). The next day Representative Floyd, another of the House managers, again attempted to persuade his colleagues of the strength of the enforcement scheme contemplated by the bill (51 Cong. Rec. 10519, emphasis added):

> That is not all. Under Section 5 of the bill any private litigant injured by the unlawful acts of any corporation, whether the *Government of the United States* has proceeded against such corporation and obtained a judgment either in *a court of law or equity* is allowed use of that judgment or decree to show the unlawful acts of ~~that judgment or decree to show the unlawful acts of~~ the combination to the full extent that it would be an estoppel between the Government and the original offender. * * * That is a new remedy and a most efficient remedy. The Government of the United States, acting in behalf of all of its citizens prosecutes a trust, convicts it either in *a criminal or a civil court* and the private litigant, injured by the unlawful acts of such trust, has nothing to do in order to recover the three-fold damages except to prove the amount of damages and that the injury was done by this trust or corporation. * * *
>
> But that is not all. There are several other remedies provided in this bill. Under Section 11, the violation of Sections 2, 3, 7, and 8 may be enforced, respectively, by the Trade Commission, by the Interstate Commerce Commission, or by the Federal Reserve Board.

If Representative Floyd had believed it possible that these administrative rulings might inure to the benefit of treble-

Finality Act an intention to convert a Commission order into a "judgment or decree" for the purposes of Section 5(a)—a consequence never suggested during consideration of the Finality Act. Most important, Congress might well have concluded as a matter of substantive policy that it was unwise to give such *prima facie* effect to an order made without regard to the rules of evidence in the comparatively free and untried administrative proceedings of the proposed new Federal Trade Commission. In this con-

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damage plaintiffs, he would surely have mentioned, indeed proclaimed, that fact.

(iii) During the debates on the Federal Trade Commission Act, which was pending concurrently with the Clayton bill, Senator Cummins proposed an amendment to the effect that "no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust acts." (51 Cong. Rec. 12788.) With respect to that amendment, the following interchange ensued (51 Cong. Rec. 12789–12790):

> Mr. CRAWFORD. I refer more particularly to the findings of the court.
>
> Mr. SUTHERLAND. I am taking up the propositions of the Senator seriatim. I am first dealing with the question of the commission. So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> Mr. CRAWFORD. I do not, either.
>
> Mr. SUTHERLAND. I doubt very much whether we could make them evidence. I hope to discuss that question in another connection later along, before we get through with this bill. So far as the decision of the court is concerned, however, I see no reason in the world why that decision should not be admissible as an estoppel in another proceeding involving the same facts though called by a different name.

text there are important differences between judicial and administrative proceedings.

Whether the meaning of Section 5(a) be clear or ambiguous with respect to Federal Trade Commission proceedings, it should not determine the question whether such a proceeding tolls the running of the statute of limitations, because of the interplay between the policy of Section 5(b) and Section 4B. The words "final judgment or decree," which are the most persuasive textual arguments for excluding Federal Trade Commission proceedings from Section 5(a), are not repeated in Section 5(b). Furthermore, while we think that a Federal Trade Commission proceeding could be held to be a "civil or criminal proceeding * * * instituted by the United States," the real thrust of our argument is that the exact meaning of the phrase need not be decided because the underlying statutory policy is applicable to Federal Trade Commission proceedings whether the language covers them or not; and that policy, we submit, is controlling in determining whether the running of the statute of limitations has been tolled. See p. 28, *supra*. From this point of view, Section 5(b) is readily severable from Section 5(a), since the considerations determining whether an administrative order should be given the same effect as *prima facie* evidence as a court adjudication in subsequent private litigation are altogether different from those involved in determining whether the running of the statute of limitations should be tolled.

II

RESPONDENT'S SHERMAN ACT CLAIMS WERE BASED "IN PART" ON "MATTER[S] COMPLAINED OF" IN THE COMMISSION PROCEEDING

Under Section 5(b), the statute of limitations is tolled only as to those private rights of action which are "'based in whole or in part on any matter complained of" in the prior government proceeding. The second issue in the case is whether respondent's claims under Sections 1 and 2 of the Sherman Act were based "in part" on the same "matter complained of" in the earlier Trade Commission proceeding. The question need be reached, of course, only if the Court concludes that Commission proceedings, like judicial suits brought by the Justice Department, toll the limitations period. We note, however, that the second issue—the equivalence of subject matter between the earlier and later proceedings—is logically independent of the first; it would arise in precisely the same form even if the prior enforcement proceeding had been a court suit by the Justice Department, rather than a Trade Commission proceeding.

Respondent's Sherman Act claims rest on allegations that petitioner combined and conspired to restrain, and attempted to monopolize, trade in the manufacture, sale and distribution of electrical insulation products, for the purpose, among others, of suppressing and eliminating competition in the distribution of such products; that one of the acts by which petitioner carried out the conspiracy and attempt to monopolize was the acquisition of the IWI, the third largest distributor of such products and the

distributor on which respondent primarily relied for the distribution of the products it manufactured; and that the effect on the respondent was to disrupt its pattern of manufacture, sale and distribution and to foreclose to it a substantial portion of the national market for electrical insulation products (R. 49a–54a).

The allegations plainly are based, "in part" at least, on matters "complained of" in the Commission proceeding. The Commission complaint charged that the IWI acquisition, together with that of another distributor, put into the hands of petitioner, itself a manufacturer of electrical insulation products, two of the three largest distributors of such products; that following these acquisitions the distribution for a number of manufacturers who had reached the market through those distributors was discontinued (R. 24a); and that the effect of petitioner's acquisition of those particular distributors included "the actual or potential lessening of competition" in the manufacture, sale and distribution of electrical insulation products and the foreclosure of manufacturers "from a substantial share of the markets for said products" (R. 25a). In short, both the Commission and the respondent allege that the effect of petitioner's acquisitions of distributors of electrical insulation products has been to injure competing manufacturers of those products by denying them the access to the market that they formerly had through the acquired distributors. All that the statute requires for tolling is that there be a "substantial similarity" (*Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 219 (C.A. 9)) or a "substantial

identity of subject matter" (*Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 570 (C.A. 10)) between the private and the government suit. The standard plainly is satisfied here.

Petitioner argues (Brief 71) that respondent's Sherman Act claims, unlike its Clayton Act claim, are different from the matters complained of in the Commission proceeding in that a Sherman Act violation is predicated upon an actual restraint of trade or monopolization, whereas a Clayton Act violation requires only a potential anticompetitive effect. It maintains that the Commission "apparently considered that no actual restraint of trade or monopoly had resulted from [petitioner's] acquisition" (Brief 74), whereas respondent has charged that petitioner "fomented an actual restraint of trade and monopolized commerce * * *." *Ibid.*

We note first, that the Commission alleged that the effects of petitioner's acquisitions included an "actual" as well as a "potential" lessening of competition and that manufacturers "have been foreclosed from a substantial share of the markets" (R. 25a). Thus the Commission's complaint did charge an actual restraint. Secondly, respondent alleged that petitioner's conduct constituted an attempt to monopolize (R. 54a). Such an illegal attempt may be established even though no restraint prohibited by Section 1 is achieved. *United States* v. *Columbia Steel Company*, 334 U.S. 495, 525, 531–532. Thus, with respect to respondent's claim resting on Section 2 of the Sherman Act, respondent need not establish an actual restraint of trade.

There is, however, a more fundamental objection to petitioner's argument. Under its theory, the private antitrust litigant is not entitled to await the outcome of the government proceeding, notwithstanding that the private antitrust claim may allege conduct identical, word-for-word, with that alleged in the government complaint. The tolling provision is said to be inapplicable if the only difference between the government and the private complaint is that the former alleges that the conduct *may* substantially lessen competition (Clayton Act, § 7) and the latter alleges that it *has* done so (Sherman Act, § 1). The statute, however, provides for tolling as long as the private antitrust claim is based merely "in part on any matter complained of" in the government proceeding, and the fact that the private suit alleges that the same conduct has greater anticompetitive effect than was alleged in the government suit does not make the conduct challenged in the private suit any the less a "matter complained of" by the government. Moreover, petitioner's argument disregards this Court's reluctance to "add requirements to burden the private litigant beyond what is specifically set forth by Congress * * *." *Radovich* v. *National Football League*, 352 U.S. 445, 454.

CONCLUSION

The decision below gives effect to the policies underlying Section 5(b) of the Clayton Act and promotes the interest in the maintenance of a competitive economy by facilitating private suits as sanctions for violations of the antitrust laws. While the result is difficult and perhaps impossible to justify in terms of

conventional analysis of the text and legislative history, it is supportable as a proper judicial application of the legislative will in an area in which the courts have traditionally looked, not to the words of the limitation alone, but to other established legal policies in determining whether the running of the statute should be tolled.

Accordingly, the judgment should be affirmed.

Respectfully submitted,

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